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the court should refuse to act until the evidence has been introduced. This is especially true of actions, as in most cases of fraud, in which the facts are complicated, and the issues numerous. Of course where an attorney is forced to rely to a great extent upon circumstantial evidence and hostile witnesses, and cannot tell exactly what he will be able to prove, the court should allow him to proceed with his case.<sup>10</sup>

No hard and fast rule upon the subject can be laid down, but the court must be guided by its own sound discretion in each particular case. Many cases fall clearly upon one side of the line or the other, but when a doubt arises it should be resolved against the directing of a verdict upon the opening statement of the attorney, and he should be permitted to put in his testimony and make out a case if possible. There is certainly great danger involved when the determination of a cause is made to depend upon an informal statement by counsel of what he deems to be the essential points of his case, rather than upon a consideration of the actual facts as brought out by the examination of witnesses.

E. J. S.

WATERS AND WATERCOURSES: CONSTITUTIONAL LAW: FORFEITURE OF RIPARIAN RIGHTS FOR NON-USER.—An important source of future litigation is to be found in the provisions of the recently enacted California Water Commission Act<sup>1</sup> declaring riparian rights forfeited after ten years non-user of the water, and also limiting riparian rights to such waters as are or may be reasonably needed for useful and beneficial purposes. Whether these provisions will stand, or must fall as an unconstitutional interference with vested rights, promises to become a hotly contested question; and what the outcome will be, no one can foretell with certainty.

A case of considerable interest in this connection is *In re Willow Creek*,<sup>2</sup> lately decided by the Oregon Supreme Court, and originally adjudicated by the State Water Commission under the Oregon Water Code.<sup>3</sup> There were numerous claimants, mostly appropriators; but one claimant, the Eastern Oregon Land Company, owned riparian lands, the title to which was derived from the federal government prior to the Desert Land Act of 1877.<sup>4</sup> It therefore possessed riparian rights,<sup>5</sup> according to the interpretation of that act by the Supreme Court of Oregon. It strenu-

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<sup>10</sup> *Darton v. Interborough Rapid Transit Co.* (1908), 125 App. Div. 836, 110 N. Y. Supp. 171.

<sup>1</sup> (1913) Stat. Cal., 1012, § 11.

<sup>2</sup> (Oct. 21, 1914), 144 Pac. 505.

<sup>3</sup> Oregon Laws, 1909, p. 319.

<sup>4</sup> 19 Stats. at L. 377, U. S. Comp. Stats. (1913), §§ 4674-4680. For effect of that act on riparian rights in Oregon, see *Hough v. Porter* (1909), 51 Ore. 318, 98 Pac. 1083.

<sup>5</sup> *Taylor v. Welch* (1876), 6 Ore. 199.

ously questioned the constitutionality of the Water Code on various counts; but, since that code did not provide for the forfeiture of riparian rights because of non-user, as does the California act, the company lacked that basis of attack. Consequently, the question of the validity of such a provision was not presented. However, in determining the amount of water to which this riparian owner was entitled, the court dealt rather critically with riparian rights; and it is this fact which merits comment.

The court asserts that the Water Code does not destroy vested riparian rights, such as those of the Eastern Oregon Land Company, and that such rights can not be taken away by legislative enactment nor judicial decree; but holds that they are "subject to reasonable regulation". Instead of recognizing the riparian owner's right to an uninterrupted flow of the stream, undiminished except by the reasonable use of other riparian owners,<sup>6</sup> the court awarded it a definite amount of water, and decreed the surplus to subsequent appropriators, thus limiting a riparian owner's right in the stream, not to the uninterrupted flow thereof, but to the amount of water which might be put to beneficial use. Instead of permitting the riparian owner, on the plea of benefit to his lands, to claim all the flood waters of the stream, as against subsequent appropriators, however wasteful that ruling might be from an economic standpoint,<sup>7</sup> the court limited its right to the amount of water necessary to an economic irrigation of the land. Instead of recognizing the doctrine that a riparian owner's right is not, and cannot be, lost by non-use,<sup>8</sup> the court refused to award it more than it had put to use in the past, because "it had not shown that it desired or intended to use any more water, and had not shown what part of its other land was susceptible of irrigation." In other words, unless the riparian owner proved to the court that it intended or desired, or was capable of putting to beneficial use more than it had used in the past, its riparian rights would be in so far curtailed by non-user.

The language of the court, that "while vested water rights cannot be arbitrarily nor unreasonably interfered with by the Legislature", they are "subject to reasonable regulation", indicates that it relied on the police power in thus curtailing vested riparian rights. Is this reliance justifiable? And can the Cali-

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<sup>6</sup> *Hargrave v. Cook* (1895), 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; *Miller & Lux v. Enterprise Canal & Land Co.* (Feb. 19, 1915), 49 Cal. Dec. 251, 271, rehearing decided March 18, 1915.

<sup>7</sup> *Miller & Lux v. Madera Canal & Irr. Co.* (1909), 155 Cal. 59, 99 Pac. 502, 22 L. R. A., (N. S.) 391; *Wiel*, *Water Rights in Western States*, 3rd ed., §§ 815-832, and cases cited.

<sup>8</sup> *Wiel*, 3rd ed., § 861; *Sampson v. Hoddinott* [1857] 1 C. B., (N. S.) 590, 87 Eng. Com. Law Rep. 590; *Hargrave v. Cook*, *supra*, note 6; *Duckworth v. Watsonville Water & Light Co.* (1907), 150 Cal. 520, 89 Pac. 338.

fornia courts in turn rely on the police power to sustain the forfeiture provision of the California Water Commission Act?

Of authority on these questions, there is very little, and what there is is inconclusive.<sup>9</sup> A Nebraska statute abrogating riparian rights on streams of over twenty feet in width was held unconstitutional.<sup>10</sup> The difference between such a statute and forfeiture for non-user is plain. In South Dakota it has been held that a statute providing for forfeiture for non-user after three years was a taking of property without due process of law.<sup>11</sup> But the holding is dictum; while a three year period might well have been held to give the riparian owner an unreasonably short time in which to put the water to use. In California there are conflicting dicta.<sup>12</sup> The cases in Colorado, Arizona, Wyoming and other states,<sup>13</sup> abrogating the riparian doctrine, do not offer much assistance, for they all take the ground that riparian rights had never become vested in those commonwealths, and hence do not go to the length of holding that vested water rights may be sacrificed to the public welfare.

When the validity of this provision of the California Water Act is brought before the California courts, the solution will have to be worked out on principle. It will be sought to sustain the provision as an exercise of the police power, following the suggestion in the case of *In re Willow Creek*. Whether this can be done is, to say the least, problematic. When it comes to forfeit-

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<sup>9</sup> Numerous courts have construed statutes on the subject of water and water rights as not dealing with or impairing vested water rights. But none of those statutes purported to cover such rights, so that the question under consideration was not presented. *Benton v. Johncox* (1897), 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. 912; *Farm Investment Co. v. Carpenter* (1900), 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747.

<sup>10</sup> *Clark v. Cambridge & A. Irr. Co.* (1895), 45 Neb. 798, 64 N. W. 239.

<sup>11</sup> *St. Germain Irr. Co. v. Hawthorn Ditch Co.* (1913), 143 N. W. 124.

<sup>12</sup> *Sloss, J.*, in *Miller & Lux v. Madera Canal Co.*, *supra*, note 7, p. 65: "If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain." *Henshaw, J.*, in *Miller & Lux v. Enterprise Canal & Land Co.* (1913), 47 Cal. Dec. 1, at p. 7: "It may well be that there is room for and even need for legislation which will require riparian proprietors to exercise their irrigation rights in the use of water within a limited period, or to be decreed to have waived those rights". On rehearing, (Feb. 19, 1915), 49 Cal. Dec. 251, this dictum was not repeated.

<sup>13</sup> *Coffin v. Left Hand Ditch Co.* (1882), 6 Colo. 443; *Clough v. Wing* (1888), 2 Ariz. 371, 17 Pac. 453; *Drake v. Earhart* (1890), 2 Idaho 750, 23 Pac. 541; *Farm Investment Co. v. Carpenter*, *supra*, note 9.

ing real property rights, such as water rights have been held to be,<sup>14</sup> and when the reason for such action is a mere negative failure to use the right, it will take an extremely progressive court to apply the doctrine of the police power. The use of real property has been curtailed, to promote the public health, safety and welfare, in cases too numerous to be cited here; and there are many cases where personal property has been destroyed.<sup>15</sup> But in all those cases the property was a positive menace to the public. Such can scarcely be said of a non-used water right; it is not a positive nuisance.<sup>16</sup>

On the other hand, the argument for the exercise of the police power in this situation has been suggested by the Supreme Court of Washington, although only by way of dictum.<sup>17</sup> "It is not to the state's interest that the water of non-navigable streams should be idle or going to waste because one of its citizens having a preference right to its use unjustifiably neglects to avail himself thereof, while others stand ready and willing, if permitted, to apply it to their arid lands".

H. J. W.

WILLS: REVOCATION: ATTEMPTED REVOCATION PREVENTED BY FRAUD OR UNDUE INFLUENCE.—Where a testator has been prevented by fraud or undue influence from revoking his will, can equity aid the injured parties? The English Statute of Wills and statutes patterned after it expressly enumerate the requisites of a valid revocation.<sup>1</sup> Some American statutes make express provision for fraud used in securing a revocation,<sup>2</sup> but both the English and the American statutes wholly fail to provide for relief against fraud used in preventing revocation. It has therefore been uniformly decided under these statutes that the use of fraud or force to prevent a testator from revoking his will cannot itself operate as a revocation.<sup>3</sup> The will stands, and must be probated as if no fraud had occurred. Title passes by operation of law and equity will not interrupt its passage.<sup>4</sup>

<sup>14</sup> *St. Helena Water Co. v. Forbes* (1892), 62 Cal. 182.

<sup>15</sup> *Newark & S. O. H. Ry. Co. v. Hunt* (1888), 50 N. J. L. 308, 12 Atl. 697; *Dunbar v. City Council of Augusta* (1892), 90 Ga. 39, 17 S. E. 907.

<sup>16</sup> See *Gaines v. Buford* (1833), 31 Ky. 481.

<sup>17</sup> *State ex rel. Liberty Lake, etc. Co. v. Superior Court* (1907), 47 Wash. 310, 91 Pac. 968, at p. 970. See also *Little Walla Walla Irr. Union v. Finis Irr. Co.* (1912), 62 Or. 348, 124 Pac. 666, 668.

<sup>1</sup> *Stats. 7 Wm. IV & 1 Vict.* (1837), c. 26, § 20; *Cal. Civ. Code*, § 1292.

<sup>2</sup> *Cal. Civ. Code*, § 1272.

<sup>3</sup> *Estate of Silva* (Jan. 6, 1915), 49 Cal. Dec. 40, 145 Pac. 1015; *Doe d. Reed v. Harris* (1837), 6 Ad. & E. 209, 33 Eng. Com. Law Rep. 129.

<sup>4</sup> *Bohleber v. Rebstock* (1912), 255 Ill. 53, 99 N. E. 75; see 7 Ill. Law Rev. 388.